DATUK MOHD. SARI DATUK HJ. NUAR

v.

NORWICH WINTERTHUR INSURANCE (M) SDN. BHD.

SUPREME COURT, KUALA LUMPUR
MOHD. JEMURI SERJAN CJ (BORNEO)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-455-91]
15 JULY 1992

BANKRUPTCY: *Appellant applied to set aside the bankruptcy notice - Whether bankruptcy notice valid - Whether Court could include a term to the parties' agreement implying that the respondent could issue bankruptcy notice for the balance if appellant defaulted in payment of any agreed instalments.*

Consent judgment was recorded in the High Court against the respondent on 27 November 1987 for RM530,000 together with interest thereon at the rate of 8% per annum from 5 June 1986 to date of realisation and RM350 as costs. On 27 December 1988 the appellant's solicitors offered to pay the said judgment sum by monthly instalments of RM25,000 commencing on 31 January 1989. The Respondent's solicitor accepted the appellant's offer and issued receipts for seven instalment payments thereafter. The appellant defaulted the monthly instalments. No terms or conditions were stipulated by either party in the event of default of the instalment payments.

The respondent issued a bankruptcy notice demanding payment of the sum of RM505,603.87 being the balance of the amount due. The appellant then applied to set aside the said bankruptcy notice. The learned High Court Judge dismissed the appellant's application to set aside the bankruptcy notice with costs. Hence this appeal by the appellant against the dismissal

Held:

[1] The terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors and non-compliance with the judgment was not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

[2] The proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 ("the Act") was limited to excess demand and therefore not applicable to the instant case where the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s. 3(1)(i) of the Act but was in accordance with the terms of an agreement subsequently entered by the parties. Therefore non-compliance with such notice would not constitute an act of bankruptcy on a strict construction of the Act.

[3] As the bankruptcy notice was invalid for the various reasons stated, the appellant's application to set aside the bankruptcy notice in this case should have been allowed.

[4] Under the circumstances, the appeal was allowed with costs and the bankruptcy notice was ordered to be set aside.

[Appeal allowed with costs. Bankruptcy notice set aside. Deposit refunded to appellant.]

[**Bahasa Malaysia** Translation of Headnote]

KEBANKRAPAN: *Perayu memohon untuk notis kebankrapan diketepikan - Sama ada notis kebankrapan sah - Sama ada Mahkamah boleh memasukkan terma kepada persetujuan kedua pihak yang menyirat bahawa responden boleh mengeluarkan notis bankrapsi untuk baki hutang jikalau perayu ingkar bayaran ansuran bulanan yang telah dipersetujui.*

Satu penghakiman persetujuan telah direkodkan oleh Mahkamah Tinggi terhadap responden pada 27 November 1987 untuk jumlah RM530,000 dengan faedah 8% setahun bermula 5 Jun 1986 hingga ke tarikh pembayaran dan RM350 sebagai kos. Pada 27 Disember 1988 peguamcara perayu menawarkan untuk membayar jumlah penghakiman melalui bayaran bulanan sebanyak RM25,000 sebulan bermula 31 Januari 1989. Peguamcara responden menerima tawaran perayu dan berikutnya mengeluarkan resit untuk tujuh bulan bayaran. Perayu bagaimanapun gagal membayar bayaran seterusnya. Kedua pihak tidak menetapkan apa-apa terma jika berlaku kegagalan untuk membayar.

Responden mengeluarkan notis kebankrapan menuntut pembayaran sejumlah RM505,603.87 yang merupakan baki wang yang terhutang. Perayu selepas itu memohon untuk mengetepikan notis kebankrapan dengan kos. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan:

[1] Terma penghakiman persetujuan telah dikawal oleh satu persetujuan luar di antara penghutang penghakiman dan si piutang penghakiman melalui peguamcara mereka dan ketidakpatuhan dengan penghakiman bukanlah satu tindakan bankrapsi selagi terma penghakiman tersebut dikawal oleh persetujuan luar tersebut.

[2] Proviso (ii) kepada s. 3(2) Akta Kebankrapan 1967 dihadkan kepada permintaan yang kelampauan dan oleh kerana itu tidak dapat dipergunakan dalam kes ini di mana permintaan untuk bayaran dalam notis bankrapsi adalah bukan selaras dengan terma-terma penghakiman persetujuan seperti dikehendaki oleh s. 3(1)(i) Akta tersebut tetapi sebaliknya adalah selaras dengan terma-terma perjanjian yang telah dipersetujui kemudian oleh kedua pihak. Oleh kerana itu ketidakpatuhan dengan notis tersebut tidak bermakna terdapat satu tindakan bankrapsi mengikut tafsiran ketat.

[3] Oleh kerana notis bankrapsi tersebut adalah tidak sah di atas sebab-sebab yang dinyatakan, permohonan perayu supaya bankrapsi notis diketepikan dalam kes ini sepatutnya telah dibenarkan.

[4] Dalam keadaan ini, permohonan tersebut dibenarkan dengan kos dan notis bankrapsi yang telah diperintah diketepikan.

[Rayuan dibenarkan dengan kos. Notis bankrapsi diketepikan. Deposit dikembalikan kepada perayu]

Cases referred to:

Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board [1973] 1 WLR 601 ***(refd)***
Re H.A. Pereira Ex parte Pagor Singh (Bhagat Singh) [1932] MLJ 112 ***(dist)***
Re H.B. [1904] 1 KB 94 ***(foll)***

Legislations referred to:

Bankruptcy Act 1883 [UK], s. 4(1)(g)
Bankruptcy Act 1967, s. 3(1)(i), (2)

For the appellant - Idrus bin Ibrahim; M/s. Kam Woon Wah & Co.
For the respondent - Johari bin Baharuddin; M/s. Jagjit Singh & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

Consent judgment was recorded in the High Court at Kuala Lumpur against one Datuk Mohd Sari bin Datuk Haji Nuar (hereinafter referred to as "the appellant") on 27 November 1987, for a sum of RM530,000 together with interest thereon at the rate of 8% per annum from 5 June 1986, to the date of realisation and RM350 as costs (p. 43 of the appeal records).

On 27 December 1988, the appellant, by a letter through his solicitors Messrs Lee & Associates, offered to pay the said judgment sum by way of monthly instalments of RM25,000 each commencing on 31 January 1989 (p. 22 of the appeal records). Norwich Winterthur Insurance (M) Sdn. Bhd. (hereinafter referred to as "the respondent"), through its solicitors Messrs Jagjit Singh, accepted the appellant's offer and in fact issued receipts for seven instalment payments thereafter. No terms or conditions were stipulated by either party through their solicitors to provide for the eventuality of a default in the payment of any instalment. The appellant could not pay the instalments for the months of August to December 1989 inclusive for a sum totalling RM125,000. The respondent therefore on 27 March 1990, issued a bankruptcy notice in Bankruptcy No. D2-29-2598 of 1990 demanding payment of the sum of RM505,603.87 being the balance of the amount due on the final judgment obtained by the respondent against the appellant on 27 November 1987 (see p. 13 of the appeal records).

The appellant then applied to set aside the said bankruptcy notice and the application was heard on 29 October 1991, by V.C. George J in the High Court at Kuala Lumpur. The learned Judge adjourned the case to 31 October 1991, and on that day dismissed the appellant's application to set aside the bankruptcy notice with costs.

In his written judgment, the learned Judge stated that "the effect of the understanding arrived at between the parties, as I see it, is that bankruptcy proceedings will not be effected so long as the agreed instalments are paid." His Lordship held that the said bankruptcy notice was properly issued "in that it was in respect of the amount due in terms of the judgment less amounts paid to account".

On appeal to us, learned Counsel for the appellant, Encik Idrus bin Ibrahim, contended that it was not the intention of the parties or the terms of their agreement that if any instalment was not paid, the respondent was at liberty to issue a bankruptcy notice for the balance of the judgment sum. He contended that the learned Judge failed to consider that the respondent could not issue the bankruptcy notice for the balance sum outstanding on 27 March 1990, because it was estopped from denying that it had agreed to allow the appellant to pay the judgment sum by instalments and that there was no "default provision" in their agreement. It was also contended that the learned Judge had erred in implying a term to the parties' agreement that the respondent could issue the said bankruptcy notice for the balance outstanding if the appellant defaulted in the payment of any agreed instalment. Counsel referred to *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, where the Court held that no term can be implied just because, in the light of subsequent events, it may seem reasonable and desirable. The Court also held that no term will be implied unless the Court can say that both parties must have intended it.

With respect to the learned Judge, we cannot find in the correspondence between the solicitors for both parties that there was any term in their agreement that if there was a default in the payment of any instalment, then the judgment creditor was entitled to proceed to issue a bankruptcy notice in respect of the balance due on the judgment debt. In this respect, reference can be made to the local case of *Re H.A. Pereira Ex Parte Pagor Singh (Bhagat Singh)* [1932] MLJ 112. The facts of that case are different from those in the present case in that there was an order in that case for the payment of the judgment debt by instalments

and Mudie J in that case held that the judgment was modified by the order for the payment by instalments and that a bankruptcy notice which is founded on the judgment as it originally stood was invalidated.

In the case of *Re H.B.* [1904] 1 KB 94, the UK Court of Appeal held in 1904 that a bankruptcy notice was bad in that it did not require payment of the debt "in accordance with the terms of the judgment" within s. 4 subsection (1)(g) of the UK Bankruptcy Act 1883, where the judgment had been modified by some collateral agreement. We were referred to the following passage in the judgment of Vaughan Williams LJ in that case:

> In the agreement nothing is said as to whether the whole of the instalments are to be deemed to become due upon default in payment of any one of them, nor is there anything said with regard to the successive executions on the judgment. A sum of £300 was to be paid down on or before the execution of the agreement, and the judgment debt was to be paid by monthly instalments. Default having been made in the payment of three monthly instalments that had become overdue, a bankruptcy notice was issued, and that bankruptcy notice was issued in respect of the whole of the judgment debt. That notice came under the consideration of the registrar upon an application to set it aside, and it was set aside and, in my judgment, rightly set aside, because it is quite plain that under the agreement the sum was not due.

We would also refer to the following passage of Lord Stirling LJ in the same case:

> By a collateral agreement the creditor agreed to accept payment by instalments, and so long as the time fixed for payment of the last instalment had not arrived the creditor could not, consistently with that agreement, enforce payment of the whole judgment debt; that is to say, he could not require payment of the judgment debt 'in accordance with the terms of the judgment'.

Similarly in the present case, the terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

We should mention here that we have noticed in the notes of proceedings recorded by the learned Judge in the Court below that reference was made by Encik Idrus to s. 3(2) of the Bankruptcy Act 1967. But according to the notes of proceedings recorded by the learned Judge and the affidavits filed, there is no evidence nor any statement by either Counsel whether the debtor had within the time allowed for payment given notice to the creditor that he disputes the validity of the said notice on the ground of a mistake in it as the sum specified in the notice as the amount due exceeds the amount actually due.

Be that as it may, we were also of the view that the proviso (ii) to s. 3(2) was limited to excess demand and therefore not applicable to the instant case where the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s. 3(1)(i) of the Bankruptcy Act but was in accordance with the terms of an agreement subsequently entered by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act.

As we considered that the bankruptcy notice was invalid for the various reasons stated, the appellant's application to set aside the bankruptcy notice in this case should have been allowed. In the circumstances, we therefore allowed the appeal of the appellant from the High Court with costs here and below and ordered that the said bankruptcy notice be set aside. The deposit would of course be refunded to the appellant.

Also found at [1992] 4 CLJ 1798